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## Designing A More Effective Managed Care Contracting Team

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Well-negotiated managed care relationships deliver long lasting value to payors, providers, and patients—but what constitutes a thorough and successful negotiation, and how is that achieved?

Power and leverage can drive a contract negotiation the same way that brute force might drive a street fight: without finesse, and without the promise of a long term solution. Similarly, less than accurate language or fancy word play can net a quick return, but at high cost to reputation and business ethics—not to mention the results of the next negotiation.

Market dynamics today are simply too fluid to expect that the industry “bully” (payor or provider) can sustain aggressive or abusive negotiation tactics over an extended period of time. A payor that was last year an irrelevant insurer among a basket of commercial payors to a given hospital could the next year be acquired by a major player or start serving as third-party administrator to a large local employer. Likewise, a community hospital surrounded by competitors could rise to the top of a payor’s new quality ratings, driving beneficiaries with deductible or coinsurance incentives to the hospital in large numbers in the next year.

In short, today’s contracting teams cannot rely solely on power or gamesmanship to drive long-term value in contracting. Successful managed care contracting involves a mature and careful consideration of both business and legal issues; and it is our belief that the integration of these disciplines into the contracting team is a key determinant of such success

This article attempts to address those issues that demand consideration as discovered through survey and interviews of the real world experiences of lawyers and business executives in their own contract negotiations. This guidance is essential for managed care organizations (MCOs) and providers to understand how to achieve a desirable contract even without the power and leverage.

### **What Are the Determinants to Success?**

A successful negotiation is one in which a contract team achieves the broad variety of goals inherent in an agreed resolution. While agreement on pricing is the most obvious goal, other goals are also important. They include:

- Stability in the relationship;
- Predictability with respect to pricing and payments over the course of the contract;
- Connections that allow for a positive working relationship; and
- Efficient approaches to resolving disputes.

A positive approach to negotiations, and the agreement drafting itself, might also achieve the realization of opportunities not known before the conversations began; potentially in the form of new markets or products to expand the relationship. The question becomes, what can be done to get the most out of a negotiation?

#### *Clarity of Expectations*

It is imperative that a team approach a negotiation with a clear consensus as to what are their minimum goals to be achieved. It reflects poorly on an organization when its own people cannot agree on contractual terms; such disorganization will delay reaching resolution and may well be reflected in the final product.

### *Emphasize Mutual Goals and Advantages*

Contract discussions should be framed in terms of mutual interest rather than adversarial terms. A signed contract is a defined relationship; the negotiation of that contract should be approached as if it were a bridge to that relationship. An adversarial approach to a potential partner will not strengthen the long-term relationship, though it might yield short-term satisfaction.

Points of negotiation should be considered in terms of their potential benefits to each party before the parties take their seats at the table. It is important to explain why the agreement might be mutually advantageous. If a particular contract might weaken the foothold that another health plan has on the market, that might be disadvantageous to a provider who would prefer more diversification and competition.

### *Availability of Data*

It is difficult for even the most skilled negotiator to argue against data. Approaching the table with enough solid financial evidence to convince a payor to meet a requested reimbursement, or to convince providers that reimbursements are consistent with regional financial data, gives great power to an argument in negotiation. Accurate and soundly based modeling is critical here.

### **What Interpersonal Dynamics Put a Negotiation at Risk?**

A signed contract is a relationship. The strength and mutually beneficial nature of that relationship are determined in large part by the personal dynamics that present during the negotiation. For a negotiation to succeed, clarity of communication is paramount. Risks to clear communication include:

#### *Failure to follow through on operational issues of provider concern*

If one party raises a question that cannot be answered during negotiations, it is essential that any promises to find an answer are kept and the issue discussed at subsequent meetings. To do otherwise reflects a lack of commitment to the other party and may appear disrespectful.

#### *Lack of attention to detail in contract discussions*

This issue often manifests itself as a failure to address directly all of the issues and concerns raised by the other party. Whether an issue initially appears important or not, it should be assumed that it is raised for a reason and needs to be directly addressed. It is also important that both parties understand the interplay between the overall agreement and the specific language being drafted to reflect that agreement. Objective, clean, and goal-oriented contract language is as important as the agreement on financial terms, and should be given attention as such.

#### *Confusion of voices*

It is important that each party approach the table for negotiations with a clear and well communicated sense of its goals, expectations, breaking points, and possible concessions. Team efforts must be coordinated and a consistent message delivered. Unspecified or unagreed upon details limit success.

### **The Contracting Team: Techniques to Ensure Effective Cooperation**

Effective cooperation of the contracting team—within the organization, and among team members—is at the core of an effective contract negotiation. But how can cooperation be assured, or restored in the case of a team breakdown?

#### *Initial planning sessions including all disciplines*

Representatives from each discipline that is to be called on during and after the contract negotiation should be included in such discussions at the very earliest stages (legal, financial, operational, JCAHO/NCQA teams, compliance, patient accounts, sales, etc.). These internal meetings are immensely valuable to the contracting team. Without this level of involvement, surprises will appear at moments where they cannot effectively be addressed. Worse still, important issues may arise after the deal has been inked, requiring either uncomfortable reopenings or the failure to address at all.

### *Documentation of the key institutional needs*

An output of the initial sessions should be simple, useable written documents describing the essential needs of each discipline. This can, but need not, be a wish list—although it should be supported by examples from the current contracting relationship (or similar relationships) about why these needs are, in fact, real.

### *Regular communications*

Periodically scheduled meetings with key members of the contracting team ensure that issues or concerns are regularly discussed and objectives reiterated. The timely delivery of objectives and expectations to internal team members is important to maintaining team confidence and communication. When expectations remain clear, individuals can have an understanding of where, when, and why their participation might be needed. There are several new technological solutions that allow for real-time communication within an organization to allow various stakeholders to monitor progress, and provide input where needed.

### *Escalation to Senior Management*

Issues that cannot be resolved by the contract manager or at director level should be escalated to senior management. For example, if an overall financial discussion threatens to deteriorate negotiations in a multi-year contract, senior management might appropriately be able to assess and influence the positions of both parties. In some cases contract team members might find it appropriate to meet with key stakeholders at the hospital or provider level, to identify the right people to approach for the resolution of a given issue.

## **Identifying and Prioritizing the Legal Issues**

Contract negotiations involve both business and legal issues. But how can legal issues be identified and prioritized by a team of business-minded professionals, who would rather remain out of the “legal boilerplate”?

### *Integration of the business team*

If the business side sees lawyers as “business inhibitors” or even “necessary evils,” they are missing opportunities. Legal team members should be invited to “imbed” themselves within the business team, to develop familiarity and a manner of communication with a group that might not think or speak as lawyers. This integration makes a legal advisor part of a team and part of a solution, setting a foundation for a more stable advisory relationship. This allows both sides to get an early understanding of regulatory concerns and the right vocabulary for contract negotiations, and can be helpful in ensuring all the terms necessary for a clear and complete contract are articulated and achieved.

### *Pre-define the legal guidelines*

Legal advisors to the contract team should define the legal contractual guidelines upfront, when expectations for the contract are being discussed, so that the later product does not need to be revised against a new set of rules. Having a baseline or expected minimum level of protection gives security to all members of the team. If the negotiation team is going to trigger or violate one of these baseline expectations, the issue should be brought back to senior legal or business management so that the organization understands what is at stake and what the risks and benefits of the proposed change might be.

### *Define the risks and consider remedies*

Discussion of legal risks and consequences should be put into appropriate context, such that they might be understood in terms of real world and business implications. Details as to *why* the language is important, or what risk it could pose to the organization if any legal requirement is unmet, should be clearly and objectively explained. Where small errors or oversights might lead to huge losses or significant penalties, planning and education are important.

Lawyers must be able to provide specific examples or, at least, estimates of whether a described “risk” is real or remote. While it is the first responsibility of the legal advisor to draw attention to risks, it is also essential for the legal advisor to consider and suggest potential contracting solutions. If every issue is viewed as a deal-killer, the lawyer’s credibility will be the first victim, the company’s objectives the second.

## **Identifying and Prioritizing the Business Issues**

The other side of that equation is: the legal team is equally responsible for the recognition of and adherence to the concerns of the business team. How can these legal advisors stay business-minded?

### *Early involvement*

Members of the legal team should be involved in contract negotiations early, before all the major financial terms have been negotiated, so that they might understand the framework of and perspectives behind the deal. Also, legal team members could identify legal issues or concerns that might otherwise go unconsidered during the negotiation process. Introducing important issues after the “handshake” is a recipe for a marginalized legal team. Raising them early helps everyone save face and be effective at the role they are to play.

### *Legal-minded communication*

Just as legal advisors must communicate in non-legal language, business team members must communicate in language that a legal team can understand. Use of “lingo” or “business shorthand” will need to be translated into enforceable contract language, so patience is required.

### *Emphasizing the importance of timing*

Time is of the essence in contract negotiations and signings—and this must be emphasized to legal team members. Padding a contract with legalese might prolong the negotiation process as providers may be reluctant to sign a document that contains too much unfamiliar legal language. A term sheet or glossary should be prepared to convert legal terms to plain English, including what are the practical implications of so-called “standard” contract terms.

## **Contract Issues Posing Operational Challenges**

Even the most well negotiated contract might pose operational challenges to the parties. It is beyond the scope of this essay to discuss how each issue might be resolved, but common issues that can raise contracting focal points would include the following:

- “Most favored nation” clauses or general language suggesting the same—implementation in a manner consistent with state law and business relations, and to avoid unconsidered collateral price decreases that might impact Medicare or other governmental program payments
- Vague language relating to negotiating or performing in good faith
- Ensuring that the long-term value will not be adversely affected by the addition or departure of significant numbers of providers or employers
- Material change provisions, particularly in multi-year contracts
- Elaborate dispute resolution clauses, which often provide an incentive for providers to frequently and repeatedly invoke the dispute resolution process
- Clear conveyance of party intent. If the contract is to be used to settle dispute and the original parties are not present, how will intent be communicated?
- Effects of consumer driven healthcare on reimbursement and realization expectations
- Negotiated reimbursements that health plans cannot configure to pay correctly
- Multiple contracting forms or formats

## **Final Suggestions and Best Practices**

This article ends with a discussion of “best practices” for contract negotiations as were suggested by experienced executives.

### *Identify politics*

Relationships between parties are important, as are relationships among team members. It is valuable to have an understanding of a client's politics (i.e. doctors versus hospitals, role of state regulations, religious concerns, organizational pressures, affiliate issues, etc.) and to retain that understanding as these issues are discussed.

*Communicate, communicate, communicate*

Keep team members on the same page, and counsel apprised of significant issues as the negotiation unfolds—they may have input or experience that bears on how issues are approached.

Communications should include all parties not only during the negotiation—as departments affected by certain provisions or pieces of an agreement should be given opportunity to review before sign-off—but also after, such that all parties are well aware of what was decided, and are reminded of those provisions as needed.

*Learn from experience*

Senior executives might be advised to keep a database of provisions that are not standard in agreements, but have been used in certain negotiations if the issues are of great importance to providers (e.g. anti-leasing of the network, mechanisms to monitor performance of an employer group)

*Remain consistent*

Contract negotiations should be approached with clearly established guidelines and needs that remain consistent

*Resolve Issues*

Managed care contract negotiations are complex. There are many issues to resolve. It is important to resolve all those issues before executing a contract. Where disputes exist prior to the negotiation, it is better to resolve these disputes in the negotiation, and not “reserve” them for a post-contract dispute process. Where new or unexpected issues arise (they always do), treat them as such—and don't try to exact some “re-opener” price. Where mistakes are made or positions revisited, seek to determine why before seeking resolution. Finally, if there are issues that simply cannot be resolved, then agree on an efficient and timely process to resolve them.

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